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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

LUANN STEVENSON - - - - Petitioner

versus

GARY RAY STEVENSON - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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27 February 1981

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Kentucky Court of Appeals, in applying an incomplete and incorrect standard on review, violated Petitioner's Constitutional rights to Due Process and Equal Protection.

2. Whether the Kentucky Court of Appeals, in failing to require a nexus between the Petitioner's lesbian lifestyle and alleged harm to her child, made a *per se* distinction in violation of Petitioner's Due Process and Equal Protection rights of the Fourteenth Amendment.

3. Whether the Kentucky Court of Appeals, in changing custody based solely on Petitioner's lesbian lifestyle, without requiring actual present harm to the child to be shown, violated Petitioner's First, Ninth and Fourteenth Amendment rights.

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LUANN STEVENSON - - - - *Petitioner*

v.

GARY RAY STEVENSON - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner, Luann Stevenson, respectfully prays that Writ of Certiorari issue to review and reverse the Opinion and Final Order of the Kentucky Court of Appeals issued 11 July, 1980.

The Kentucky Supreme Court declined to exercise review by Order entered 9 December 1980.

OPINION BELOW

The Final Order and Opinion of the Court of Appeals of Kentucky is reported as *S.* v. *S.*, Ky. App., 608 S. W. 2d 64 (1980); and is reprinted in the Appendix at pages 28-49.

A Motion for Review was denied by the Kentucky Supreme Court on 9 December 1980, is reported at 608 S. W. 2d 64 (1980); and is reprinted in the Appendix on page 26.

Petitioner's Motion for Stay, ex parte, was granted on 23 December, 1980, is reported at Ky. App., —— S. W. 2d —— (1980); and is reprinted in the Appendix on pages 51-54.

Petitioner's Motion for an additional stay, pending Petition for Certiorari to the United States Supreme Court, was granted by the Court of Appeals of Kentucky on 28 January, 1981, is reported at Ky. App., —— S. W. 2d —— (1981); and is reprinted in the Appendix on page 25.

JURISDICTION

The Final Order and Opinion of the Kentucky Supreme Court, denying review of the Kentucky Court of Appeals, was issued and entered on 9 December, 1980. Pursuant to 28 U.S.C. §2101(c), this Petition for Certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, First Amendment:

> [Religious and political freedom.]—Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Ninth Amendment:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Constitution, Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

KRS 403.340:

> 403.340. Modification of custody decree.—(1) No motion to modify a custody decree may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.

KRS 403.270(2):

> (2) The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

STATEMENT OF CASE

Pursuant to an agreement filed on 8 September, 1976, which was incorporated into a Decree of Dissolution of 12 January, 1977, the Petitioner, Luann Stevenson, had care, custody and control of the parties' child, Shannon. She was born 24 April, 1976.

On 11 November, 1977, the Respondent, via a multi-count affidavit, made a Motion to change custody. A responsive affidavit was filed.

A trial was held on 16 August, 1978. The trial court ruled that of all the allegations of Respondent's affidavit, the only one which would merit consideration involved the Petitioner's sexual preference.

Petitioner's testimony consisted of two (2) expert witnesses and three (3) lay witnesses.

The unrefuted expert evidence was as follows:

Allan Bloom, Ph.D., Child Psychologist from the Child Evaluation Center, Department of Pediatrics, University of Louisville School of Medicine, testified:

> Q. 23. What is your overall assessment of Shannon in comparison with other two-year-olds?
>
> A. In terms of the kinds of things we can look at in children this young, I saw developmentally she was well within normal limits in all areas. Her intellectual development was definitely at least average, with a mental age of two years and five months in terms of her reasoning, thinking and language skills. She was two years two months when seen. Her language development was within normal limits. Her social and emotional developments seemed clinically to be within normal limits.

Her development in self-care and social skills was at an early three-year level, and in some areas, maybe a little bit advanced, and interpersonal, in terms of how she interacted with me, I thought she interacted quite well for a two-year old.

* * *

Q. 28. And what was your assessment of that?

A. I thought the interactions, at least from what I could observe in an office-type atmosphere, were generally adequate and within normal limits. I thought that the eye contact between the mother and the child was good. I thought the emotional and expressiveness between the parent and the child were good, and I thought that the child seemed to interact normally with her parent in terms of what you would expect from a two-year old. For example, at times the child tended to be clinging and shy when first coming into the situation, tended to cling a little bit to the mother, and at other times, would actually want to be left alone, which is a very normal two-year old behavior, in fact one if you didn't see, you would worry about a little bit, sort of exercising a sense of wanting to be independent, et cetera.

So, at this age, the parent-child interaction is really looking at a combination of protectiveness and ability to let a child just explore, et cetera, and I thought those interactions were well within normal limits.

Q. 29. Based on your evaluation and your observation of mother-child interaction, do you find any evidence that Shannon is endangered in any way?

A. No, not from what I observed.

Q. 30. Physically?

A. Physically—

Q. 31. I understand you didn't perform a physical examination, but did you see anything unusual?

A. No, I didn't see anything unusual in the first area, although, that is not my area of training.

Q. 32. She didn't appear to be endangered mentally?

A. No, definitely not.

Q. 33. Morally?

A. No.

Q. 34. Emotionally?

A. No. From what we can tell of children of this age in terms of what we could look at, there were definitely no clinical signs that I could pick up on that would indicate any aberration in her development at this time.

Q. 35. Was there anything you could pick up that would indicate that at a future age she might show any endangerment, assuming the environment remained the same?

A. Yeah, assuming the environment remained the same, I would generally expect, I would see no reason to expect, any marked changes in her behavior or in her development unless they were coming from a physical or neurological type of thing or disease process. Although, these tests don't predict at this young age future development; I think the best I can say with this environment up until this time where there is no indication of abnormalities in the child.

Q. 36. All right. I want to pose a couple of hypotheticals to you. I want you to assume an evaluation of a child of findings identical to those you found of Shannon. Now, assume the additional fact, that this hypothetical child's mother is a lesbian; would that change your assessment in any way?

A. No, not at this age it would not change the assessment at all.

* * *

Q. 43. From what you are able to observe, and what you learned from the test you administered, you feel that Shannon is a normal twenty-six month old child?

A. Definitely.

Q. 44. And shows no evidence of any problems?

A. Psychologically, no.

Q. 45. All right.

* * *

Q. 6. I'm asking you about that situation, not what is, but—

A. I'm not sure that would not be an ideal situation. Again, I think a lot depends on things you can observe from family to family. I'm not sure of a function of the sex identity of the parents as it is on specific ways of which a child is raised and reared. I think there are many examples that I come across clinically of lesbian relationships and homosexual relationships where the child's sexual identity was not interfered with at all, which raised absolutely no conflict or issue developmentally for the child. So, I think it's

hard to say it wouldn't be ideal. I think as a psychologist all I could look for are indications within a family that may show or may have some correlation with abnormal development. In this situation, I saw no indication, at this point, and with the environment as it has been of any developmental problems in the child. It's difficult for me to say much more than that.

* * *

Q. . . . You may assume you have a child like or exactly patterned like that of Shannon Stevenson, you may assume that in your initial deposition you found Shannon to be a very typical child and not in any emotional, moral or physical danger. Do you believe that Mrs. Stevenson's lifestyle, and you may assume that that is as a lesbian relationship at this time, would indicate to you that this child will grow up or will pattern her future lifestyle after Miss Stevenson's or any other atypical lifestyle? Did you detect any of that in your findings?

A. No, not in my findings themselves.

Q. Would you agree that Dr. Green's study, even though it's a preliminary study, would indicate that fear, at least in the children that Dr. Green saw, was greatly lessened?

A. If I can comment on Dr. Green's study in terms of his conclusion, I think that would clarify the matter somewhat and his conclusion I agree with.

Q. Okay.

A. And that's that there were no startling effects or what he could find to be clinically sig-

nificant effects on these children's psychological developments on the concept of their being raised by homosexual mothers, a preliminary and exploratory and not necessarily definitive study and definitely to be pursued scientifically. Based on the leading theories and science that pertain to this issue, psychoanalytic and role modeling in psychology, Dr. Green did not find data to be very startling, but again with a concept of a non-definitive study, one that raises questions about the nature of those theories and applicability of the theory.

* * *

Q. 2. Would anything — if there were some sort of problem in the environment which the mother provided for the child, would it have shown up in that period of time—I mean developmentally.

A. I think if there were a serious problem. In other words, again, I think what we are looking at are really sort of global types of things. It's difficult to detect subtleties, and I don't know if you can call any subtleties abnormal anyway. I saw no indications of abnormal development in the child and in the environment, as far as I could observe from the parent-child interaction, from that sample of behavior, and, obviously, being unfamiliar with any other aspects of the environment. But, I would say up to this time, I would suspect environment has not been abnormal for this child by the results of the findings.

* * *

Q. She only lived in this situation only a matter of months at that time, hadn't she?

A. That's right.

Q. You wouldn't expect under any circumstances, Doctor, for anything unusual to develop in that period of time for that young a child unless it was a traumatic experience of some type?

A. As relating to psychosexual identity?

Q. Yes. You wouldn't expect anything to happen in this short a period of time?

A. Well, some things could happen. A lot of things probably don't happen. Where it could be measured, one that has happened to this child —happening by the age of two, two and a half— that's the development of core sexual identity, of seeing oneself as a boy or as a girl. That has occurred or at least was occurring, but other aspects of sexual identity are yet developing.

* * *

Q. Dr. Bloom, did Shannon seem to see herself as a girl or a boy?

A. Shannon saw herself as a girl.

Robert Kidd, M.D., Shannon's pediatrician since birth, commented as follows:

Q. 27. Does she have any other physical problems?

A. No, good general health.

Q. 28. Does Mrs. Stevenson bring her in for needed treatment?

A. Yes, she does.

Q. 29. Have you seen any evidence of physical abuse?

A. No.

Q. 30. Any psychological or emotional abuse that you've detected?

A. No.

Q. 31. Does Shannon evidence any abnormal psychological characteristics that you've noticed?

A. No.

Q. 32. Have you been able to detect any signs that Shannon is being endangered in any way?

A. No.

Q. 33. Physically, mentally?

A. No, I haven't seen her in for anything regarding an injury. No, I have not.

The trial court, after reviewing the testimony of the expert and non-expert witnesses, indicated that the Respondent had not met the burden established by KRS 403.340 and overruled the Respondent's motion to change custody.

The Respondent perfected a successful appeal to the Kentucky Court of Appeals. The Court of Appeals reversed the trial court and remanded the case.

Petitioner then requested the Kentucky Supreme Court to grant review of the decision of the Court of Appeals. By Order entered 9 December, 1980, the Kentucky Supreme Court declined to do so.

On 23 December, 1980, Petitioner successfully obtained, ex parte, a Temporary Stay from the Court of Appeals.

On 28 January, 1981, the Kentucky Court of Appeals further stayed its mandate until 9 March, 1981,

Constitutional arguments involving the First, Ninth and Fourteenth Amendments were raised in both the trial and appellate courts. (See Appendix F-I.)

The trial court, acknowledging their applicability, did not believe this case turned on the constitutional issues and based its opinion on state law. Neither Kentucky Appellate Court even acknowledged that constitutional issues had been raised and ignored them in their Opinions.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. Kentucky Court of Appeals Has Decided Federal Questions of Substance in a Manner Not in Accordance With Prior Applicable Decisions of This Court.

A. THE USE OF AN INCOMPLETE AND INCORRECT STANDARD OF REVIEW VIOLATES PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

The ruling by the Kentucky Court of Appeals violated Petitioner's Equal Protection and Due Process guarantees as articulated in the Fourteenth Amendment.

First, the Kentucky Court of Appeals failed to follow the full statutory language of KRS 403.340 and KRS 403.270(2), and established a separate, *ultra vires* standard which governed this particular case.

Second, it allowed a change of custody based upon a *per se* distinction which was bottomed on Petitioner's lifestyle and supposed future "social stigma".

1. Statutory Standard

The standard for review in Kentucky court decisions involving change of custody is articulated in KRS 403.340:

> (1) No motion to modify a custody decree may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.

See also *Wilcher* v. *Wilcher,* Ky. App., 566 S. W. 2d 173 (1978); *Dexter* v. *Spainhoward,* Ky. App., 563 S. W. 2d 474 (1978).

Further, 403.270(2) mandates that the court not consider any factor that has no proven effect on the child.

The Court of Appeals found:

> The wife (Petitioner) denies any overt lesbian relationship in the presence of the child and there is no proof to the contrary.

The trial court found:

> . . . After preliminary hearings, the issue before us has been narrowed to solely a question of whether or not the mother's lesbianism serves as a basis to change custody.
>
> Several other allegations were raised in the motion for modification, however these collateral issues have been virtually stipulated as being no longer at issue and in any event the evidence should

> suggest that there was an insufficient basis for change of custody on these collateral issues.
>
> . . . We further find no evidence of present harm to the child in our case. Ergo, we must conclude that the Respondent has failed to meet the burden for change of custody as required by KRS 403.340, and the motion should be overruled.

The Court of Appeals of Kentucky then used the following standard:

> ". . . The present custodians shall continue for the first two years unless it is shown (1) the environment *may* endanger the physical, mental, moral, or emotional health of the child, and (2) that the stability of the consistency is outweighed by the advantages attendant to change. . . . 'The polar star is to determine what is for the best interest of the child.' (Emphasis by Court.)
>
> The key word in KRS 403.340 is 'may'. We do not perceive this word connotates that the injury to the 'physical, mental, moral, or emotional health' must have already occurred or be occurring at *present* time." (Emphasis by Petitioner's counsel.)

Due Process and Equal Protection guarantees should ensure that the standard of review is applied to litigants in a fair and even-handed manner.

Herein, not only was the standard of KRS 403.340 not applied fairly, key elements of the statute, which is the standard for change of custody, were purposefully ignored by the Kentucky Court of Appeals.

The quotation, *supra,* from the Court of Appeals concedes that, in Petitioner's matter, if there is

any danger, it does not presently exist. It also points out that the Court contrived a new standard: one that ignores the words "present" and "seriously" from the statutory mandate of the Kentucky legislature.

In construction of statutes, it is well settled that the intention of the law-maker is to be deduced from all of the words of the whole statute or statutes which apply. *Brown* v. *Duchesne,* 19 How. 183, 15 L. Ed. 595 (1857); *McDonald* v. *Thompson,* 305 U. S. 263 (1938); *United States* v. *American Trucking Associations, Inc.,* 310 U. S. 534 (1940); *Kokoszka* v. *Belford,* 417 U. S. 649 (1974); *Philbrook* v. *Glodgett,* 421 U. S. 707 (1975).

KRS 403.340 is crystal clear; there must be a harm in the child's *present* environment which may *seriously* endanger the child.

2. Social Stigma

The Court of Appeals conceded it could find no actual danger or harm in the present environment of the child, nor did the Court comment on the seriousness of any danger that it may have found, other than to speculate upon a future "social stigma".

One of the purposes of KRS 403.340 and KRS 403.270(2) is to provide finality to custody determinations and stability for children. Yet, contrary to KRS 403.270(2), the Kentucky Court of Appeals considered the sexual status of the Petitioner as a factor in its decision, despite the fact that the sexual status proved to be of no consequence to the child.

The consideration of Petitioner's sexual preference, despite the legislative admonition to the contrary, shows, quite vividly, a misapplication and/or convenient forgetfulness which violated Petitioner's Due and Equal Protection rights.

The statutes are clear. A present environment replete with actual harm to the child must be shown to warrant change of an original custodial decision.

This Court must not be misled by whimsical incantations concerning "social stigma". Even if stigma or harassment could constitute a danger, no such harassment was ever shown to be a factual matter in this case. Rather, these words were interjected into the record by supposition and prejudiced imagination. Such "stigma" was *never* proven to exist. Petitioner further submits that, even if it did exist, such "stigma" is not a sufficient basis to change custody, nor interfere with a fundamental right. *Loving* v. *Virginia,* 388 U. S. 1 (1967).

The Court of Appeals of Kentucky set up a less rigid and separate standard of review for Petitioner's litigation. Despite the fact that it does not have legislative functions, the Court changed the rules that apply to custody matters. Such *ultra vires* action violates the essence of Due Process and Equal Protection.

B. THE FAILURE OF THE KENTUCKY COURT OF APPEALS TO APPLY KRS 403.270(2) TO HOMOSEXUAL CUSTODIANS VIOLATES PETITIONER'S RIGHT TO EQUAL PROTECTION OF THE LAWS.

The guarantee of Equal Protection must ensure that litigants involved in civil matters concerning custody

of their children have the same standard apply to that litigation regardless of their personal preferences. There is no rational basis to treat any change of custody matter under any other standard. Rather, equal protection requires that all proceedings comply with the same standard.

However, as mentioned above, this is *not* what occurred to Petitioner. A separate standard, other than what is mandated by KRS 403.340, was applied to her custody litigation in the State Court.

This Court must consider the State Appellate Court's refusal to properly apply KRS 403.270(2).

KRS 403.270 applies to matters involving change of custody. See *Atwood* v. *Atwood,* Ky., 550 S. W. 2d 465 (1976).

It is also apparent that in "misconduct" custody cases involving heterosexuals, KRS 403.270 is applied. See *Moore* v. *Moore,* Ky., 577 S. W. 2d 613 (1979).

However, regarding custody matters involving homosexuals, such an even-handed application has not occurred.

When an incorrect and/or incomplete standard of review is coupled with a suspect classification (homosexuality), Equal Protection has been violated.

When, as here, a suspect classification is involved in making a determination, that determination is subject to strict scrutiny standards. *Frontiero* v. *Richardson,* 411 U. S. 677 (1973).

In *Frontiero,* this Court indicated if it can be shown that the group has a long and unfortunate history of discrimination, that this discrimination is based upon a group characteristic which will not likely change; and that characteristic bears no relationship to function in society, then the strict standard must be applied.

Homosexuals can show a long and unfortunate history of discrimination, and determinations against them should be subject to strict scrutiny. *Acanfora* v. *Board of Education of Montgomery County,* 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds,* 491 F. 2d 498 (4th Cir. 1974). See Hunter and Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy,* 25 Buff. L. Rev. 691-733 (1976) and Note, *The Avowed Lesbian Mother And Her Right To Child Custody: A Constitutional Challenge That Can No Longer Be Denied,* 12 San Diego L. Rev. 799-864 (1975).

Petitioner was unconstitutionally deprived of a fundamental right to remain as custodian because of her sexual preference. The Court of Appeals declined to provide such strict scrutiny. Rather, it adopted a new approach in custody matters. What makes this matter even more disturbing and constitutionally alarming is the fact that no nexus between Petitioner's lifestyle and any danger to the child was established. Rather, the record, as pointed out above, rings with undeniable clearness that the child is a happy, normal one with a loving, excellent mother.

The treatment afforded Petitioner by the Court of Appeals of Kentucky denies her both Due Process and Equal Protection.

II. Kentucky Court of Appeals Has Ignored a Federal Question Involving a Homosexual's Due Process and Equal Protection Rights in a Manner Which Conflicts With Other State Courts of Last Resort.

Other State Courts, some of last resort, have held that homosexuals may not be deprived of child custody without a showing of actual harm to the child. *Bezio* v. *Patenaude,* Mass., 410 N. E. 2d 1207 (1980); *Schuster* v. *Schuster,* Wash., 585 P. 2d 130 (1978); *In Re J.S. and C.,* N. J., 324 A. 2d 90 (1974); *A.* v. *A.,* Ore., 514 P. 2d 358 (1973); *People* v. *Brown,* Mich. App., 212 N. W. 2d 55 (1973); *Nadler* v. *Superior Court,* 63 Cal. Rptr. 352 (1967). See also *Gay Law Students Ass'n* v. *Pacific Tel. & Tel. Co.,* 156 Cal. Rptr. 14, 595 P. 2d 592 (1979) (employment opportunities).

Additionally important was the lack of recognition of the constitutional issues involved in the arbitrary change of custody from a homosexual parent, despite an evidentiary record void of any showing of actual, non-speculative harm to the child.

The Kentucky Trial Court, while at least acknowledging the constitutional ramifications, felt that it did not have to reach the point and decided the matter solely under KRS 403.340.

Both Kentucky Appellate Courts failed to even acknowledge that constitutional issues had been raised.

Thus, because of the Appellate Court's refusal, Petitioner was denied the opportunity to completely litigate her position.

Based upon an apparent modern trend in behalf of both constitutional recognition and successful custody litigation of homosexuals' custody rights, this Court should allow Petitioner a forum for such a constitutional challenge.

III. Kentucky Court of Appeals Has Decided an Important Case of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Based upon the dreadful treatment and unenlightened trampling of Petitioner's fundamental constitutional rights to retain custody, this Court should grant certiorari and reverse the Kentucky Appellate Court.

This Court has recognized the fundamental rights associated with the family and children and expressed a desire to forward constitutional issues in this area. See *Meyer* v. *State of Nebraska,* 262 U. S. 390 (1923); *Pierce* v. *Society of Sisters,* 321 U. S. 148 (1944); *May* v. *Anderson,* 345 U. S. 528 (1953); *Armstrong* v. *Manzo,* 380 U. S. 545 (1965); *Stanley* v. *Illinois,* 405 U. S. 645 (1972); and *Roe* v. *Wade,* 410 U. S. 113 (1973).

This Court has not, despite important and pressing constitutional ramifications of great magnitude, yet ruled on the matter of the fundamental rights of homosexuals to retain continued custody of their children.

By not doing so, this Court has allowed a matter of utmost constitutional importance to go unanswered. The result has been that persons in the position of the Petitioner will unjustly be deprived the custody of their children. This results in a constitutional and human tragedy of wide, sweeping and untold proportions.

Of course, it is not just matters involving Due Process, Equal Protection and an unjust denial of custody that is involved.

Also involved are fundamental rights involving custody and freedom of association which are well within the penumbra and enumerated protections of the First Amendment and Ninth Amendment. See *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); *In Re J. S. and C., supra.*

Thus, it may be readily determined that this is an issue which requires involvement by this Court. This Court should not allow a state to ride rough-shod on such constitutionally sacred rights.

IV. The Kentucky Court of Appeals Made an Unconstitutional *Per Se* Distinction Which Violates Due Process and Equal Protection.

The Appellate Court's opinion was not stated in a *per se* manner.

However, Petitioner asserts that it is the results of what the Court did in this litigation, not what it said in *dicta,* which indicate how far-reaching the Court of Appeals decision will be, if it is allowed to stand.

The Court of Appeals had before it a record which was pristine regarding Petitioner's relationship with

and treatment of Shannon. Her lifestyle was extremely discreet, and not a harmful influence upon her daughter in any way. Her mother was caring and loving towards her. The child was happy and normal. The *proof* was unrefuted. Based upon such a record, even the most objective must wonder how the Kentucky Appellate Court will ever be able to reach a conclusion of continued custody for any homosexual parent.

What the Kentucky Appellate Court did was to provide an outward appearance of objectivity yet reach a conclusion that was totally biased and contrary to the specific record. For the Court to have reached the decision that it did, the Court made a *per se* distinction that homosexuals are subject to "social stigma" and thus unfit custodians.

Judge Howerton, a member of the Court of Appeals panel in Petitioner's case, stated in dissent in another case involving homosexuals: ". . . I am sympathetic with the desire of the trustees to withhold the seminary's degree from an avowed homosexual." *Lexington Theological Seminary* v. *Vance,* Ky. App., 596 S. W. 2d 11, 15 (1979).

Such a *per se* distinction violates Equal Protection and Due Process and those fundamental rights that come within the protection of the First and Ninth Amendments. *Stanley* v. *Illinois, supra.*

Litigation in the Appellate Courts of the Commonwealth of Kentucky concerning homosexuals indicates the invidious discrimination against homosexuals in the Commonwealth. In the only two reported civil cases, homosexuals have been unfavorably viewed. One

is Petitioner's litigation and the other is *Lexington Theological Seminary* v. *Vance, supra.* In both cases, Trial Court judgments, subject to reversal only for abuse of discretion or error of law, were reversed by the Court of Appeals of Kentucky.

As mentioned above, this record is replete with uncontroverted facts favorable to Petitioner and her position that she should remain the child's custodian.

Also as mentioned above, a nexus between the immediate alleged evil and harm which may seriously endanger the child is required under KRS 403.340, and/or KRS 403.270(2).

When these two elements are combined and compared to the decisions reached by the Kentucky Appellate Courts, there can be no doubt that the state Appellate Court made a *per se,* pre-judged ruling contrary to the facts and the law. Such an arbitrary ruling involving parental rights is unconstitutional and should be reversed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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27 February 1981

PROOF OF SERVICE

We, Robert Frederick Smith and Barry L. Master, counsel for Petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, First Class, postage prepaid, to Honorable Freeman Blackwell, 835 West Jefferson Street, Louisville, Kentucky 40202, on this 27th day of February, 1981.

ROBERT FREDERICK SMITH

Barry L. Master

BARRY L. MASTER
Attorneys for Petitioner

APPENDIX

COURT OF APPEALS OF KENTUCKY

No. 79-CA-1588-MR

GARY RAY STEVENSON - - - - - - *Appellant*

v.

LOU ANN TANDY STEVENSON - - - - - *Appellee*

Appeal from Jefferson Circuit Court
No. 220098

ORDER

BEFORE: HAYES, Chief Judge, GANT and WHITE, Judges

The Court, having considered the appellee's motion to strike affidavit in appellant's response to motion for stay, and being otherwise sufficiently advised, ORDERS that said motion to strike be, and it hereby is GRANTED.

The Court, having considered appellee's motion for stay of execution of this Court's mandate pending application for writ of certiorari to the Supreme Court of the United States, the response thereto, and otherwise being sufficiently advised, ORDERS that the enforcement of this Court's mandate of December 10, 1980, be and it hereby is, STAYED until March 9, 1981.

ENTERED: January 28, 1981

(s) William M. Gant, Judge
Court of Appeals

SUPREME COURT OF KENTUCKY

80-SC-519-D
(79-CA-1588-MR)

LU ANN STEVENSON - - - - - - - *Movant*

v.

GARY STEVENSON - - - - - - - *Respondent*

Jefferson Circuit Court
220098

ORDER DENYING DISCRETIONARY REVIEW

The motion of Lu Ann Stevenson for a review of the decision of the Court of Appeals is denied.

ENTERED December 9, 1980.

(s) John S. Palmore
Chief Justice

OPINION RENDERED: JULY 11, 1980

COURT OF APPEALS OF KENTUCKY

File No. 79-CA-1588-MR

GARY RAY STEVENSON

v.

LOU ANN TANDY STEVENSON

Appeal from Jefferson Circuit Court
Action No. 220098

MANDATE

The opinion rendered on the above date, a copy of which is attached hereto and made a part hereof, is now final. It is therefore the mandate of this Court that its ruling, as set forth in the opinion, now be carried out.

The Appellant having paid $100 in filing fees, pursuant to Rule 76.42(2), the Appellee shall reimburse the Appellant in the amount of $100, pursuant to Rule 76.42(3).

DECEMBER 9, 1980—Movant's Motion for Discretionary Review by Supreme Court Denied.

(s) John C. Scott, Clerk

Issued: December 10, 1980

OPINION RENDERED: JULY 11, 1980; 10:00 A.M.
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 79-CA-1588-MR

S - - - - - - - - - - - *Appellant*

v.

S - - - - - - - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Earl O'Bannon, Judge
Action No. 220098

REVERSING AND REMANDING

BEFORE: GANT, HOWERTON and VANCE, Judges.

GANT, JUDGE. (At the request of the appellant and without objection by the appellee, the names of the parties are withheld from this opinion.)

The appellant and appellee, husband and wife respectively, were divorced in January, 1977, the husband not being represented by counsel and agreeing that the custody of the infant daughter, then less than one year old, be placed with his wife. In the ensuing months, the wife began a lesbian relationship with a female companion. The extent of the relationship included working at a lesbian bar, moving the female companion into the home with the child, and exchanging vows and rings with this other woman in a mock wedding ceremony at the wife's place of employment. The wife denies any overt lesbian relationship in the presence of the child and there is no proof to the contrary.

After learning of this situation, the husband filed a motion seeking change of custody, this motion being filed some ten months after the decree of dissolution. The court, on its own motion, referred the parties to a well qualified psychologist for testing. The psychologist conducted extensive tests and interviews with the husband, his present wife and the mother, but not the child. The mother employed an apparently equally qualified psychologist, who examined the child but no one else. Thus, this Court must examine the composite of the reports to arrive at a conclusion. The lower court, with considerable reluctance, denied the motion for change of custody.

The appellee would require this Court to determine whether lesbianism is, as a matter of law, sufficient to justify a change of custody. We are unwilling to assume this burden as the lower court did. Instead, we feel that the question is whether this deviate practice is sufficient, *in this case,* to warrant the change. Thus we must examine the evidence herein and determine the applicable legal standard.

Appellant contends that the overriding and omnipresent consideration is "the best interest of the child"; the appellee urges that the sole standard is whether there is a present showing that the environment has already affected the child. Neither is totally correct. It is obvious to this Court that the purpose of KRS 403.340(1) is to provide stability and finality to a custody decree and, in our opinion, creates an assumption that the present custodian shall continue custody for the first two years unless it is shown (1) that the environment *may* endanger the physical, mental, moral or emotional health of the child; and (2) that the stability of consistency is outweighed by the advantages attendant to change. Also, as Justice Sternberg stated in *Atwood* v. *Atwood,* Ky., 550

S. W. 2d 465 (1976), ". . . the polar star is to determine what is for the best interest of the child."

The key word in KRS 403.340 is the word *"may."* We do not perceive that this word connotes that the injury to the "physical, mental, moral or emotional health" must have already occurred or be occurring at the present time. The potentiality for such danger is the test and the courts are not required to wait until the damage is done.

Applying these standards to the present case, we examine the testimony of the examining psychologists. The psychologist appointed by the court, in his report, stated as follows:

> [Homosexuality] raises serious issues in terms of the child's future.
>
> * * *
>
> Without question, in my opinion, there is social stigma attached to homosexuality. Therefore, Shannon will have additional burdens to bear in terms of teasing, possible embarrassment and internal conflicts. Also, there is excellent scientific research on the effects of parental modeling on children. Speculating from such data, it is reasonable to suggest that Shannon may have difficulties in achieving a fulfilling heterosexual identity of her own in the future. There would seem to me to be no rational reason for purposely submitting a child to these additional and potentially debilitating influences.

Such evidence, we feel, meets the burden of proof required by the statute. *See Wilcher* v. *Wilcher,* Ky. App., 566 S. W. 2d 173, 175 (1978). To refute this we have the testimony of the psychologist of the wife, who examined the child at age 2½. His testimony is almost entirely predicated on current conditions, with virtually no prediction on future possibilities. When questioned concern-

ing the future, his response was ". . . I think the best I can say with this environment up until this time where there is no indication of abnormalities in the child." The court appointed psychologist found both parents to be reasonably well adjusted but opined that appellant's second wife was "the most stable person in the situation."

We express our appreciation for the research by the parties into this matter and particularly commend the trial judge for his independent research. This Court would call attention to an article entitled "Children of lesbians: their point of view" contained in the Journal of the National Association of Social Workers, Vol. 25, Number 3, May, 1980, p. 198, *et seq.* This article points out the fact that the lesbianism of the mother, because of the failure of the community to accept and support such a condition, forces on the child a need for secrecy and the isolation imposed by such a secret, thus separating the child from his or her peers.

We are of the opinion that the lower court erred in failing to apply the standards of "best interest of the child" and potential for endangering the physical, mental, moral or emotional health of the child and that under the evidence herein we must reverse.

ALL CONCUR.

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JEFFERSON CIRCUIT COURT

FIFTH DIVISION

No. 220098

LU ANN TANDY STEVENSON - - - - - *Petitioner*

v.

GARY RAY STEVENSON - - - - - - *Respondent*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court on a motion to change custody filed by the respondent. KRS 403.340 and KRS 403.350.

The parties were married in July, 1971. They divorced by final decree of January 12, 1977, which incorporated an agreement between the parties which provided that the petitioner-mother would have custody of the infant child of the parties, who was born on April 24, 1976.

After preliminary hearings the issue before us has been narrowed to solely a question of whether or not the mother's lesbianism serves as a basis to change custody.

Several other allegations were raised in the motion for modification, however, these collaterial issues have virtually been stipulated as being no longer at issue, and in any event the evidence would suggest that there was insufficient basis for change of custody on these collateral issues.

The petitioner-mother resides with the infant child in a two-bedroom apartment along with her "female companion". At the time of trial she was employed at the "Mother's Brew', a private women's club. Her hours of employment were some mornings and some late night and

morning hour shifts. During the daytime when she was at work a babysitter is provided. At other times her companion cares for the child. Since the divorce her employment has included work in an accounting office, a bank and an optical company. In memorandums filed since the trial it has been suggested that she is no longer employed at Mother's Brew.

The respondent after the divorce was employed for a cemetery and another company but later quit employment to return full-time to University of Louisville, where he is finishing a degree in business. He intends to pursue postgraduate work. He has been remarried for about a year and one-half. His new wife is a teacher for hearing impaired children. They also live in a two-bedroom apartment.

There were other witnesses at the trial, including the petitioner's sister and brother-in-law, her stepmother, the child's babysitter, a next door neighbor, and the petitioner's present companion. The deposition was also taken of the child's pediatrician who has cared for the child since birth. In summary, suffice to say that nothing was shown to reveal that the child has not been well-taken care of and is physically and emotionally normal. The next door neighbor did not know of the lesbian relationship until the proceedings were commenced when the petitioner told her in order that she would not be shocked. The child's babysitter completed her testimony still without knowing of the lesbian relationship. At this point we would congratulate both counsel in the tasteful manner that the case was presented. There was no attempt to shock or elicit prurient details from any of the witnesses.

Indeed the respondent has apparently rested his entire position in the matter on the basis that the petitioner has admitted her lesbianism and thus there is no need to establish further details. At trial petitioner reaffirmed a previous affidavit filed in the proceedings which stated "How-

ever, this affiant has no desire for semantics to cloud the sole issue of Shannon's well-being; thus, with the proviso that popular stereotypical characterizations do not apply to her or her relationship, and that her identity is incompletely captured by the term, this affiant would admit that her relationship could be labeled 'lesbian'."

Thus respondent submits that he and his new wife are desirous and can provide a stable home, materially and emotionally, and that the lesbian environment is not good. He assumes that the petitioner and her companion would display normal affection which would be revealed to the child. He notes that she and her companion share one bed in the otherwise adequate apartment. He admits that the petitioner makes good effort to be a good mother and that perhaps at this point in time the child may be unaware of the lesbianism. His position, and indeed the thrust of his case, is summed up in his testimony,

> "The fact that her mother has so decided to bring her lesbianism into the home whereby Shannon would have to be raised in that environment, and in my opinion that is not good. I think she should have the same opportunity that her mother, who was provided by her mother and father, and the woman she is living with was provided by her mother and father, and that was to grow up in what is the normal society today as I see it, and to have the opportunities to develop in the same way they were given without having this thing thrust upon her throughout her entire youth." (Transcript, page 12)

And further,

> ". . . I think we both had Shannon's best interest at heart, and I told her it wasn't her and her fact that she was a lesbian, that she chose to be a lesbian that

> I was questioning. It was simply the fact that I thought Shannon's rights, as an individual, should be asked. She should have a chance to decide, and since she is not old enough to decide, that some unbiased third party should have the right to decide or help her decide what is in her best interest, her rights, that she might be able to grow up in the same type environment that Lu Ann's mother and father provided her, and that the woman she is living with, father and mother provided her." (Transcript, page 45)

The evidence from the witnesses is that the petitioner's lesbian lifestyle is not blatant in any sense as may be often portrayed by the stereotyped "gay" characterizations. Her companion is a pre-school teacher. The one bed sleeping arrangement does present an outward display of a "conjugal" relationship.

Petitioner expresses intention not to consciously allow her relationship to interfere with the rearing of Shannon; she affirms that she is not anti-male and does not intend to interfere with the child's sexual identity.

Petitioner reminds the Court that we was not called upon at this time to make an initial custody decision and that the burden of proor for such a change of custody is upon the moving party. *Wilcher* v. *Wilcher,* 566 S. W. 2d 173 (1978). KRS 403.340 provides that no motion to modify a custody decree may be made earlier than two years after its date, and the Court shall not modify the decree unless it finds, upon the basis of facts that have arisen prior to the decree or that were unknown to the Court at that time, changes occurred in the circumstances that would make the modification necessary to serve the best interest of the child. And further that the Court should consider, among other things, that the child's present environment endangers seriously his physical, mental,

moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

Thus petitioner insists that this burden has not been met, since the evidence has been that the child is physically and emotionally normal and even admitted by the respondent that petitioner is in effect a good mother.

We related at the on-set of this opinion that the sole, indeed dispositive, issue in this case is the mere fact of petitioner's lesbianism. That is to say, even though the child is not patently in a harmful situation, does the petitioner's lesbianism override all other factors. Thus to hold against petitioner one must determine that her lesbian condition in itself is an immediate and serious threat to the child's best interest, because it is a condition that at present may be creating an impact upon the susceptible psyche of the tender aged child.

To so find a change of custody then, lesbianism must be found and considered to be a consideration different than a mere "sexual preference". KRS 403.270(2) provides that the Court shall not consider the conduct of a proposed custodian that does not affect his relationship to the child. This has been interpreted to include sexual misconduct and it has been held that there must be proof that such sexual misconduct affects the relationship of the parent. *Moore* v. *Moore,* 577 S. W. 2d 613 (S. Ct., Ky., 1979).

With this in mind there has also been received into evidence professional testimony. The Court on its own motion referred the parties to a clinical psychologist, who filed a report and later his deposition was taken. The petitioner also had deposition taken of a clinical psychologist.

The petitioner's psychologist is employed at the Child Evaluation Center, Department of Pediatrics, at the University of Louisville Medical School and also engages in private practice. He evaluated the child and found the

child a normal two-year-old and further found no physical, mental, moral or emotional danger to the child. He indicated that the petitioner's lesbiansim would not change his assessment of his evaluation. In his opinion one cannot determine what would be the ideal circumstances for a child simply from knowing the sex role identities of the parents and that factor alone would not be enough to define abnormal environment for a child. "I think you have to know a lot more specifically about the specific practices and behaviors of the parents, and like I say, heterosexual parents can often raise a child with sexual identity problems." (Deposition, page 22)

The Court had originally referred the parents to Dr. J. Carleton Riddick, a private clinical psychologist. He did not see the child. By him, the parents and the new Mrs. Stevenson underwent an evaluation of psychological testing. Petitioner was found to be ". . . an open young woman, of bright normal intelligence, and very ambitious in terms of career. She is career oriented, not family oriented, althought she states that she is moderately open to a future marriage. Psychological tests shows no indication of traditional psychopathology of a neurotic or phychotic nature. Tests suggests that she is a rather detached woman, uninhibited and venturesome in her approach to life, basically quite tough minded and resourceful. At the present time she appears to be quite apprehensive and insecure and somewhat guilt prone. There is, indeed, data from the psychologicals suggesting some problems in the area of sexual identity." It should be noted that at the time of the initial reference to Dr. Riddick the petitioner denied any lesbian orientation or any lesbian experience.

The respondent was found to be of average intelligence and no indication of psychopathology. His new wife was found to be very stable and functioning at a very high level psychologically, and as a matter of fact, ". . . she is the

most stable person in this situation." Dr. Riddick confesses that there is little in the way of acceptable scientific data on the long-range effects of an infant who is raised in a homosexual environment. He did opine that there is social stigma attached to homosexuality and thus the child would have burdens to bear in terms of ". . . teasing, possible embarrassment and internal conflicts." He further noted that ". . . it is reasonable to suggest that Shannon may have difficulties in achieving a fulfilling heterosexual identity of her own in the future.' Thus he concludes that the respondent would be able to offer more in terms of traditional stability and middle-class values, etc. In his deposition, Dr. Riddick again acknowledged that the lack of scientific data on the issue and again he noted that it is a fact that homosexuality in our society still carries a stigma, and thus his position was on behalf of the young child, ". . . what justification could there be for purposely adding an additional potential burden to a child, that does not have to be." (page 8) It was also his opinion that there would be an increase in the probability that the child would have some problem in achieving a heterosexual identity of her own in the future if left in her present environment.

The petitioner attempted to inject into the case an article written by Dr. Richard Green appearing in the American Journal of Psychiatry, June, 1978, by qualifying the article through the deposition of Dr. Bloom. The article itself has not been filed in the record. According to Dr. Bloom the article was ". . . an exploratory study of thirty-seven children who he has had direct clinical experience with, and all of them have been reared for any number of years in unconventional family relationships, both involving homosexual or transexual of females to males and males to females . . . etc." (Deposition, page 6 and 7). He felt that the study attained some "degree

of rigor" because it merited publication in such a journal but did not think it was a "definitive study." However, he felt that it raised some valid questions in this area.

We can find no Kentucky case precedent for our subject. Considering the nature of our subject and the changing times we would be tempted to suggest that were there actually a case on point more than a few years ago, such could likely be classified as antediluvian. Only a few years ago, substantiation of an allegation of homosexuality would rapidly terminate any custody issue.

Petitioner has cited several cases from other jurisdictions. *Nadler* v. *Superior Court,* 63 Cal. Rptr. 352 (1967). In that custody case the father was awarded custody of the five year old daughter on the basis of the court's findings that the mother was a homosexual engaging in sexual acts with other females and that the homosexuality of the plaintiff as a matter of law constituted her not a fit or proper person to have the custody. The trial court was reversed, stating "We are not saying here that the trial court abused its discretion. Rather, we are saying that the trial court failed in its duty to exercise the very discretion with which it is vested by holding as a matter of law that the petitioner was an unfit mother on the basis that she is a homosexual." (page 354)

Next petitioner cites *Schuster* v. *Schuster,* 585 Pac. 2d 130 (S. Ct. of Wash., 1978). This case actually involved two cases, (two women separated from their husbands and lived together in a lesbian relationship with the children of the respective marriages). The fathers filed for divorces. The mothers were given custody of the children but were ordered to live separate and apart. There was no appeal from those decrees. Later the fathers each filed modifications of petitions seeking custody, alleging that the mothers were in fact living together. The court stated that "At the outset we emphasize that these cases do not involve the

question of whether it was proper to award custody of the children to lesbian mothers. That question was litigated in the original divorce actions. No appeal was taken by any party . . . The only question presented by this appeal is whether any modification of the original decrees was proper." (page 132) The Washington statute prohibited a modification unless circumstances have arisen since the prior decree that were unknown at the time of the original decree of such a change of circumstances have arisen since the prior decree that were unknown at the time of the original decree of such a change of circumstances that would be necessary to modify the decree. The trial court allowed the children to remain with the mothers and deleted the prohibition against the mothers living together in an open and publicized lesbian relationship. The Court of Appeals affirmed to the extent that the fothers had failed to show a change of circumstances, but reversed the trial court for its deletion of the requirement that the mothers live separate and apart. There was a dissent in that case that suggested that there was a change of circumstance by the fact that the mothers were living together in an open homosexual lifestyle and further that that lifestyle included many activities for the purpose of advocating and proselytizing that style. The dissent continued

> "This state concern, in our view, should not be minimized. The nuclear, heterosexual family is charged with several of society's most essential functions. It has served as an important means of educating the young; it has often provided economic support and psychological comfort to family members; and it has operated as the unit upon which basic governmental policies in such matters as taxation, conscription, and inheritance have been based. Family life has been a central, unifying experience throughout American

> society. Preserving the strength of this basis, organic unit is a central and legitimate end of the police power. The state ought to be concerned that if allegiance to traditional family arrangements decline, society as a whole may well suffer . . . In this case the trial court found, in the original trial, that both parents were fit and proper persons to have the custody of the children. The fathers have since remarried and have established good homes. Where should the scale of justice be tipped? In favor of the mothers who are living in a lesbian relationship? Or on the side of the fathers whose life styles and relationships are considered normal and moral? . . . pages 135 and 136.

Next, petitioner cites *A.* v. *A.*, 514 Pac. 2d 358 (Oregon, 1973). In this case the father received custody of the two male children of the parties and later the mother sought a modification of the custody award eleven years after the original divorce. The mother had slight contact with the boys during that period of time. Her ground for the modification was that the father was a homosexual. The father denied carrying on any homosexual activity but believed he might have possible homosexual traits and tendencies. The trial court denied the motion for change in custody on the ground that there had not been a showing of substantial change in circumstances and conditions. The court further stated that "We have examined the entire record and are of the opinion that plaintiff's evidence did not show that the two boys were being exposed to deviant sexual acts or that the welfare of the boys was being adversely affected in any substantial way." page 360.

Next petitioner refers us to an article in the Buffalo Law Review (25 B.L.R. 691, 1976); "Custody Rights of Lesbian Mothers: Legal Theory & Litigation Strategy"). We would include this review as suggestive reading for

those with particular interest in this area. One might find it less than objective, with its inclusion of "litigation strategy." However, the author's review of cases does lead to a conclusion that there must be shown a factual and concrete connection between the parent's condition and the effect on the child. Several cases are noted in the review, some of which are noted elsewhere in this opinion and not repeated, among which are:

O'Hara v. *O'Hara,* 530 P. 2d 877 (Ore., 1975), which considered several factors, including the mother's lesbianism, and awarded to the father.

Drifer v. *Drifer,* (Wash., 1973), awarding to the lesbian mother, finding that the two women had a stable relationship, parenting skills and discretion regarding the sexual relationship.

Hall v. *Hall,* (Ohio, 1974). The father dismissed his own change of custody petition after psychiatric testimony that children were not being harmed by the mother's lesbianism.

Christian v. *Randall,* 516 P. 2d 132 (Colo. 1973) reversed a trial court's order removing custody of four daughters from the mother, who underwent a transexual operation to become a man, on the ground that the statutory requirement for modification was not met and on the basis that the trial court's decision was solely on her operation and in violation of the statute that the court "shall" not consider the conduct of a proposed custodian that does not affect his relationship with the child".

The Court's research led to the Journal of Family Law, 1977-1978, Vol. 16, No. 4, pages 797 to 802. This article included several cases:

Townsend v. *Townsend,* 1 Fam. Law Rep. 2380 (Ohio). Here a father was successful against a lesbian mother. There the court implied neglect when the mother "boldly and brazenly" set up a home where the children would be

reared. There was no evidence that the mother and her lover performed sexual acts in front of the children.

Whitehead v. *Block,* 2 Fam. Law Rep., 2593 (Maine, 1976). Although that state had removed restrictions on private sexual actiivties between consenting adults, the court considered that homosexuality is still a relevant consideration for custody. There was psychiatric testimony to the effect that while the eventual impact on the children growing up in a household where homosexuality existed was hard to predict, it was found in that case that the children in a lesbian's custody for five years were well-adjusted, and that she was intelligently seeking to minimize, if not totally eliminate, that impact. The mother prevailed.

In Re: Hatzoploris, 4 Fam. Law Rep. 2075 (Colo., 1977). This unusual case awarded custody to a deceased mother's lesbian lover over the child's maternal aunt, the court finding that the woman did not intend to force sexual preferences upon the child and that she offered more stability.

Immerman v. *Immerman,* 1 Cal. Rep., 298 (1954), holding that evidence of homosexuality is relevant in custody.

Mitchell v. *Mitchell,* (Cal., 1972), awarding custody to a lesbian mother, but ordering the end of her relationship.

In Re: Jane B., 380 N.Y.S. 2d 848 (1976). Here a father prevailed in change of custody, rejecting the lesbian mother's argument of a constitutional protected right to custody.

* * * * * * *

In addition the Court has found three other reported cases. *In Re: J.S. & C.,* 324 A. 2d 90 (N.J., 1974). This is actually a visitation right case, the Court holding that visitation right is protected by the Constitution and cannot be deprived per se on the basis of homosexuality. This case recites the case history of the constitutional arguments, including *Stanley* v. *Illinois.* However, it also discusses that that visitation right may be limited in the best

interest of the child. Here the homosexual father was a leader in the gay movement, lived with a lover, and had taken the children (ages eight and eleven years) on marches and rallies. The children were interview and were not disturbed by their father's activities, but did not want to be involved in the movement (indeed they didn't understand it), but they did desire to continue to enjoy his company. Professional testimony was deemed speculative and the court noted that although in December 1973 the American Psychiatric Association reclassified homosexuality from a mental disorder to a sexual disorientation, there was strong opposition and no unanimity among the members. Thus the court concluded that it must be hesitant in allowing any unnecessary exposure of a child to an environment which may be deleterious.

Chaffin v. *Frye* 119 Cal Rep. 22 (1975). This California case was a modification proceeding of a six year old Idaho decree. The lesbian mother was unstable socially and financially, had several criminal convictions, and was living with a companion. Again the *Stanley* case was raised. The Court held that homosexuality was not the sole issue and that there were "other factors relevant to the issue of custody are seen to be present, and the combination of these factors with that of homosexuality fully justify . . ." the award. (p. 25.) The Court added that homosexuality is a factor which the Trial Court could consider, being aware of the criminal aspects of homosexuality, and society's attitudes, and thus a court could conclude, that given a choice between homosexual and hetrosexual households, a homosexual household may be detrimental to the best interest of a child.

Buck v. *Buck,* 233 S. E. 2d 792 (Ga. 1977). This was an original custody proceeding where the Trial Court was held not to have abused its discretion in awarding custody to a lesbian mother who admitted to past homosexual relations

and continued to maintain friendships with persons who are homosexual, and where it was shown that the father would be as good a guardian as the mother.

We also note and commend for reading the thoughts of a Trial Judge in Michigan who has had some experience in this area on the trial level, found in the ABA's Judges Journal, Spring 1978, Vol. 17 #2, Pages 38, et seq. The author discusses several factors to consider. While homosexuality is a factor, he notes "the best interests of the child of a homosexual parent do not automatically disqualify that parent as a custodian for the child simply on the grounds of public policy . . ." (p. 41.) He also finds that ". . . at present there appears to be no scientific evidence to show that children raised by a homosexual individual or couple have a greater propensity to become homosexual than children raised in a heterosexual home . . ." (p. 41). But conversely he notes that such absence of evidence should be given no more weight than that supporting it; that is while the causes of homosexuality are unknown, there is evidence that children do assimilate the attitudes and values of their environment. Also, although the author was reluctant to express any opinion on matters of morals in deciding the cases, he did find that homosexual behavior is still generally considered to be immoral by the overwhelming majority of the mainline churches and synagogues, as well as the unchurched of the United States. Lastly, he expressed concern that even though there was a belief that the lesbian mother and companion were unlikely to deliberately foster their attitudes on children, or demonstrate sexual acts in front of the children, there remains a danger ". . . that the sexual attraction of the two adult women to each other would be manifested, perhaps unconsciously, to the children in countless pervasive ways within the home, subtly influencing their psychosexual development in an abnormal direction." (p. 41)

To complete our case review, we refer by reference to the cases in Petitioner's brief, furthering the position that Petitioner has a constitutional right not to be deprived of her child. This argument, and such cases as *Stanley* v. *Illinois,* 405 U. S. 645, 92 S. Ct. 1208 (1973), were also alluded to in several of the cases cited in our review. Suffice to say it would be impossible for a trial court not to be sensitive to the temperature of the legal waters in this area. However, a custody case also involves the rights of the father, and primarily, if not exclusively, the rights of the child. Indeed the overriding factor is the best interest of the child. *Eviston* v. *Eviston,* 507 S. W. 2d 153 (1974).

We have several alternatives open to the Court. One is to deny the Respondent's motion. Second, would be to state as a matter of law that Petitioner's condition is per se detrimental to the child, and grant Respondent's motion. Third, would be to say that her condition is not per se harmful, but the fact that she is "living with" her lesbian companion, constitutes a basis for finding for removing the child, or, make a condition upon Petitioner not to live with her companion (as was done by the trial court in *Schuster, supra.*). This alternative seems to beg the salient issue before us. The courts are increasingly facing custody questions where the custodial parent may be "living with" someone. It is becoming more and more difficult to find that as a matter of law or community standard that that fact alone is dispositive. We cannot hide from the reality of changing lifestyles. The sanctity of the "nuclear family" concept is no longer an unqualified reality. Jefferson County sees filed almost 500 divorces a month. And, right here in River City county, in 1970, 14% of families with children were single parent families.* Obviously not all un-

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*("The Community Profile", Published by Human Services Coordination Alliance, 1978)

marrieds are "living together", but even a casual observer recognizes that families now comprise many variations from the traditional concepts. It has been estimated that in the United States in 1976, the traditional intact, two parent families with children at home, and one parent working comprises only 18% of the families. We suggest that the alternative of a "nuclear family" is a factor of consideration in custody, indeed a positive factor, but not in itself dispositive as a matter of law.

Thus we conclude that the decision must be based by facing the sole issue as to whether or not Petitioner's lesbian condition is per se a basis to grant change of custody.

Intellectually and humanistically we are faced with a quandry. The homosexual issue causes absurdities on both sides of the question. The "gay rights" movement would have believed that "sexual preference" is no more innocuous than a choice of mouthwash, and of less social impact. On the other hand the "Anita Bryant" syndrome would seem to hold that all homosexuals are carriers of communicable sin. Both views lack in sensitivity to the valid concerns of the other. "Feminism" is not in issue; neither is the "American way'; nor should we be called upon to ponder "Mortal Sin". Yet, as noted previously, the community standard can be a factor hard to ignore. Petitioner's position is that she and her companion will not thrust their "condition" upon the child. Does this very caveat concede that there is something "wrong" from which the child should be shielded?

To what extend can and should a trial court inject its perspective of the community's traditional and moral viewpoint. It is true that any custody decision is more than intellectual, and involves a "gut" reaction, that is a calling

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*("The Community Profile", Published by Human Services Coordination Alliance, 1978)

upon that subconscious repository of all one's emotional, moral, and background experiences. Indeed, it has been held that it is the responsibility of the Chancellor to make a value judgment, without according any one factor of controlling significance. *Molloy* v. *Molloy,* 460 S. W. 2d 15 (Ky. 1976).

From our review of the cases previously cited from either jurisdictions, we glean a trend, if not definite holding, that homosexuality should not per se be a bar to custody. However, despite such language, the facts in most of the cases usually presented something more than the sole question of homosexuality. Further that while there seems to be a reluctance to "hold" there is nothing wrong or detrimental by having a homosexual custodian, at the same time there is reservation to let that issue be the sole basis against a homosexual parent. We detect a sense that there is still "something" amiss, something from which the child must be protected, whether it be social stigma or from assimilating "abnormal" behavior.

Thus, faced with such doubts, it is tempting to resolve a case based on "knowns" vis a vis "unknowns". That is, as stated by Dr. Riddick, the clinical psychologist, ". . . what justification could there be for purposely adding an additional potential burden to a child, that does not have to be." (dep. p. 8). The Trial Judge in the *Nadler* case, supra, has been quoted with similar feelings, "We are dealing with a four year old child on the threshold of its development—just cannot take the chance that something untoward should happen to it . . ." (Buffalo Law Review, supra, pg. 696).

We venture to suggest that avoiding the "unknowns" may stem from our own predilections and biases, which "known" that there is something not quite right and probably harmful to have a child raised by a person with a homosexual disorientation. If this is unqualifiedly true, the Court should not give lip services to a proposition that

homosexuality per se it not a bar, and then proceed to make a decision based on other factors, such as "why take a chance".

We do give more than lip service to evidence, and this is why on a case-by-case basis "other factors" are weighed, and properly so. But absent "other factors" we must take this issue out of the closet and be prepared to hold one way or the other that homosexuality is or is not a bar to custody as a matter of law.

The Court comes to the following conclusion not without frankly admitting that it somewhat chafes this Chancellor's own predispositions. However, from the case precedents cited, we conclude that the legal proposition evolved, is that homosexuality, while a factor, is not of itself a bar to custody. We further find no evidence of present harm to the child in our case. Ergo, we must conclude that Respondent has failed to meet the burden for change of custody as required by KRS 403.340, and the Motion should be overruled.

(s) Earl O'Bannon, Judge
signed May 3, 1979

JEFFERSON CIRCUIT COURT

FIFTH DIVISION

No. 220098

LU ANN TANDY STEVENSON - - - - *Petitioner*

v.

GARY RAY STEVENSON - - - - - *Respondent*

JUDGMENT

This matter having come before the Court for trial on Respondent's motion for change of custody, and the Court having heard evidence, and rendered its Findings herein, and the Court being advised;

It is Ordered that the Findings & Conclusions of the Court of May 3, 1979, be incorporated herein by reference.

It is Ordered that Respondent's Motion for Change of Custody be overruled and dismissed.

This is a Final & Appealable Order.

(s) Earl O'Bannon, Judge
signed May 3, 1979

COURT OF APPEALS OF KENTUCKY

No. 79-CA-1588-MR

GARY RAY STEVENSON - - - - - - *Appellant*

v.

LU ANN STEVENSON - - - - - - - *Appellee*

MEMORANDUM IN SUPPORT OF APPELLANT'S MOTION FOR A STAY PENDING REVIEW BY THE UNITED STATES SUPREME COURT

I. INTRODUCTION

This matter involves a dispute over a change in child custody. By Agreement, which was incorporated in a divorce degree entered 12 January 1977, the Appellee received custody of Shannon, born 24 April 1976.

Within two (2) years of the Degree, the Appellant made a motion to change custody.

The trial court determined that the single issue at trial was the Appellee's atypical lifestyle.[1] The trial court, after reviewing the testimony of the parties, their witnesses, and depositions, determined that the Appellee's homosexuality was not sufficient to result in a change of custody and the

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[1]As was found by the trial court: "Several other allegations raised in the motion for modification; however, these collateral issues have been stipulated as no longer being in issue, and, in any event, the evidence would concede that there was an insufficient basis for change of custody on these collateral issues.

Appellant has not met the burden of proof articulated in KRS 403.340.

On 11 July 1980, the Court of Appeals reversed the trial court, and on 9 December 1980, the Kentucky Supreme Court denied Movant-Appellee's Motion for Discretionary Review.

The Court of Appeals issued its mandate on 10 December 1980.[2]

Appellee is currently requesting, pursuant to C.R. 76.44(b), a stay pending Petition for a Writ of Certiorari.

II. ARGUMENT AND AUTHORITIES

Basically, the use of a stay is twofold.

It's first is so that constitutionally recognized principles be allowed the attention—even if ultimately to the United States Supreme Court—that they are deserving.

Secondly, when such a constitutional challenge is being effectuated, that the status quo be maintained.[3]

A. Constitutional Questions:

Herein, the Appellee raised significant constitutional questions at the trial and appellate level.

Appellee's claims, all associated with the fundamental right to preserve her family, have been recognized as having constitutional magnitude and embraced as a civil right in numerous other decisions. See *Meyer* v. *State of Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1045 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Prince* v. *Massachusetts,* 321 U. S.

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[2]For the convenience of the Court and counsel, copies of each are attached in an accompanying Appendix.

[3]The parties should be left in the same position that they were prior to the latest appellate court pronouncement.

158, 64 S. Ct. 438, 88 L. Ed. 1090 (1944); *Skinner* v. *Oklahoma,* 316 U. S. 535, 63 S. Ct. 1110, 86 L. Ed. 665 (1942); *May* v. *Anderson,* 345 U. S. 528, 73 S. Ct. 840, 98 L. Ed. 1221 (1952); *Stanley* v. *Illinois,* 405 U. S. 645, 92 S. Ct. 1208, 1 L. Ed. 2d 551 (1973); *JS* v. *JC,* N.J., 324 A. 2d 90 (1974).

There are additional constitutional questions about whether or not the decisions of the Kentucky appellate courts, based upon this record, violated the due process and equal protection rights of Appellee. See *Frontiero* v. *Richardson,* 411 U. S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973); *Acanfora* v. *Board of Education,* 359 F. Supp. 843, *aff'd on other grounds* 491 F. 2d 598 (4th Cir., 1974).

B. Status Quo

Except for periods of visitation, Shannon, age 4½ years, has resided continually with the Appellee.

It would be in the child's best interest if she continued to reside with Lu Ann rather than she be abruptly removed from her comfortable surroundings, her preschool environment, and the care, attention and love provided by Appellee, and transported over a thousand miles to Arizona. It must be added that there is nothing in the record as to the facilities offered by the Appellant there.

This status quo should be preserved lest Shannon suffer irreparable harm of such a tragic event.

IV. CONCLUSION

Therefore, this Court should issue a stay for ninety (90) days so that Appellee's constitutional claims can be raised before the highest Court of this land. A stay will allow her to retain custody of Shannon pending the filing of a Petition for Certiorari based upon vital claims of substantial consitutional rights.

Respectfully submitted,

(s) Robert Frederick Smith
(s) Barry Lewis Master
Attorneys for Appellee
425 West Muhammad Ali Boulevard
Louisville, Kentucky 40202

I hereby certify a true copy was this 19 day of December, 1980, mailed to Appellant's counsel, Freeman Blackwell, Esq., 835 West Jefferson, Louisville, Kentucky 40202.

(s) Robert Frederick Smith

SUPREME COURT OF KENTUCKY

No. _____

S. - - - - - - - - - - - *Movant*

v.

S. - - - - - - - - - - - *Respondent*

MOTION FOR DISCRETIONARY REVIEW—Filed August 18, 1980

Comes Lu Ann Stevenson, by counsel, and moves this Court, for reasons cited herein, to grant discretionary review; overrule the Court of Appeals' decision, and reaffirm the judgment of the Jefferson Circuit Court.

1. Movant: Lu Ann Stevenson
   Movant's counsel: Robert Frederick Smith
   425 West Muhammad Ali Blvd.
   Louisville, Kentucky 40202
   Telephone: (502) 584-1254

   and

   Barry Lewis Master
   425 West Muhammad Ali Blvd.
   Louisville, Kentucky 40202
   Telephone: (502) 584-1254

2. Respondent: Gary Stevenson
   Respondent's counsel: Freeman Blackwell
   835 West Jefferson Street
   Louisville, Kentucky 40202
   Telephone: (502) 587-6581

3. Date of final disposition by the Court of Appeals: 11 July, 1980.

4. No supersedeas bond or bail has been executed.

MATERIAL FACTS

Movant and Respondent were divorced in the Jefferson Circuit Court on 12 January, 1977. Their union begot one (1) child, Shannon, born 24 April 1976. The Dissolution provided by agreement, *inter alia,* that the Movant [Petitioner and Appellee below] would have custody of Shannon. Movant has continued to have custody of Shannon.

In November 1978, Respondent [Respondent and Appellant below], filed a multifaceted affidavit and moved for a change of custody.

In the Circuit Court, Respondent's allegations, but one (1), proved unsubstantiated or were withdrawn by him. The remaining allegation involved Movant's homosexuality.

The Trial Court overruled Respondent's motion and allowed custody to remain with Movant.

The Court of Appeals issued an opinion which reversed the Trial Court.

QUESTIONS OF LAW

A. Whether or not the Trial Court abused its discretion, or was clearly erroneous.

B. Whether or not the Trial Court was clearly erroneous when it found that lesbianism, *per se,* is not an adequate basis on which to change custody.

C. Whether or not the Court of Appeals applied the appropriate appellate standard of review.

D. Whether or not the Court of Appeals applied the correct standard to matters involving change of custody.

E. Whether or not the Court of Appeals violated Movant's Federal and State constitutional rights by refusing to allow custody to remain with the Movant upon the basis of Movant's homosexuality.

REASONS FOR REVIEW

A. Clearly Erroneous

The trial courts of this Commonwealth are vested with great discretion, particularly in matters involving custody of children. Trial Court's findings are not set aside unless clearly erroneous. See CR. 52.01; *Jones* v. *Jones,* Ky. App., 577 S. W. 2d 43 (1979); *Wilcher* v. *Wilcher,* Ky. App., 566 S. W. 2d 173 (1978); *Casale* v. *Casale,* Ky., 549 S. W. 2d 805 (1977).

Unfortunately, as mentioned above, the central and sole issue below was the Movant's homosexuality.

At trial, expert testimony from the child psychologist and from Shannon's pediatrician indicate, quite clearly, that Shannon was found to be a "normal", healthy and happy child. Shannon also scored quite favorably on the intellectual portion of the test given her. Further, Shannon had a conception of herself in a manner that was consistent with her anatomy; that is, she thought of herself as a little girl. Both the child psychologist and her pediatrician could not find any evidence of serious danger from her environment.

Trial Courts have been encouraged to exercise that wide range of discretion. Herein, despite the fact that there was *no substantial evidence* in the record to indicate that Respondent's burden of proof had been established, the Trial Court's opinion was not allowed to stand.

Whenever a Trial Court's decision is not upheld by the Court of Appeals, particularly when it is so clear on the

record that the burden of proof had not been met, this Court should grant discretionary review to correct this error.

B. Homosexuality

The Court of Appeals, after examining a composite of the experts, made its own "conclusion" when it decided that custody should be changed. It is not for the Court of Appeals to weigh the evidence; rather, this was a matter that was in the sound discretion of Judge O'Bannon. Although the Court of Appeals stated that they were unwilling to find that lesbianism *per se,* is sufficient to change custody. But in light of the fact that no serious danger or harm could be shown to Shannon from the record, it becomes readily apparent that the Court of Appeals' only reason for changing custody was the Movant's homosexuality.

The alleged *"potential* for danger", (the parent's homosexuality), has been rejected by the trend of appellate courts in this nation. See *Nadler* v. *Superior Court,* Cal., 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967); *People* v. *Brown,* Mich., 49 Mich. App. 358, 212 N. W. 2d 55 (1973); *A.* v. *A.,* Ore., 514 P. 2d 358 (1978); *Kastin* v. *Kastin,* N. Y. Sup. Ct., 2 F.L.R. 2698 (1978); *Schuster* v. *Isaccson,* Wash., 585 P. 2d 130 (1978); *Armanini* v. *Armanini,* N. Y. Sup. Ct., 5 F.L.R. 2501 (1979); *M.T.* v. *S.T.,* N. J. Sup. Ct. App. Div., 5 F.L.R. 2855 (1979); *Miller* v. *Miller,* Mich., 5 F.L.R. 2513 (1978); *Gay* v. *Gay,* Ga. App., 253 S. E. 2d 846 (1979).

Whether the Court considers a *per se* standard, or a standard that applies *"in this case,"* homosexuality is not a basis to change custody.

C. Appellate Review

The Appellate Courts of this Commonwealth are assigned specific jurisdiction. See §110 and §111, Kentucky Constitution.

Trial Courts are properly granted a wide range of discretion. The Appellate Court should refer to the Trial Court's findings; should not substitute its judgment for that of the Trial Court; and should give proper deference to the Trial Judge's ability to weigh the evidence and resolve any discrepancies therein. See CR 52.01; *Harris* v. *Quality Construction,* Ky., 593 S. W. 2d 872 (1979); *Burkett* v. *Board of Education of Pulaski County,* Ky. App., 558 S. W. 2d 626 (1977); *Boggs* v. *Burton,* Ky. App., 547 S. W. 2d 786 (1977). Herein, the Court of Appeals did not allow this deference and clearly substituted its own judgment for that of the Trial Court. This Court should grant discretionary review to ensure that the correct appellate standard is applied.

D. Change of Custody Standards

Further, in addition to not using the clearly erroneous standard, the Court created its own version of KRS 403.340. Rather than complying with the statute the Court *speculated* on *potential* for harm.

* * * * * * *

The word "may" as used in KRS 403.340 is not intended to allow courts to consider speculative evidence of possible, unproven or hypothetical future developments. The use of this word is to ensure that if serious danger exists, and the custodian decides not to remove the danger from the child's environment, then such a motion to change custody may be appropriate.

An additional difficulty with the manner in which the Court of Appeals handled this case is found in its reliance on an article of a social work nature, as proof of certain facts. This article had not been placed into the record by either party. The Court of Appeals is to review the record,

not add to it. This type of action is beyond its scope and it is not appropriate for appellate review.

Movant would point out that she did not have an opportunity to comment on, rebut, or cross-examine the author of this article.

E. Constitutional Violations

Serious and substantial matters for consideration are the constitutional ramifications of the Appellate Court's decision. Constitutional considerations, although raised at trial and on appeal, were completely ignored by the Court of Appeals.

When an incorrect, and/or incomplete standard of review, and/or suspect classification (homosexuality) is used; and/or no nexus is established between the standard of review (serious danger for child in present environment) and the classification, the removal of her child presents serious Federal and State constitutional violations of Movant's rights. Constitutional considerations include due process, equal protection, those fundamental considerations that come within the penumbra of the First Amendment, and Ninth Amendment considerations.

Whenever a suspect classification is involved in making a determination, that determination is subject to the strict scrutiny standards. *Frontiero* v. *Richardson,* 411 U. S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973). Distinctions based upon homosexuality have been subject to this test in the past. Further, homosexuals can show a long and unfortunate history of discrimination. This discrimination was documented in Movant's brief to the Court of Appeals. The fundamental rights that come within the penumbra of the First Amendment, coupled with the freedom of association and privacy that must be protected from unwarranted governmental intrusion, and the fundamental right of

parenthood, the ramifications are quite severe. See *Griswold* v. *Connecticut,* 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *NAACP* v. *Alabama,* 357 U. S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1962); *Meyer* v. *The State of Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1045 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944); *Acanfora* v. *Board of Education,* 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds,* 419 F. 2d 498 (4th Cir. 1974); *Stanley* v. *Illinois,* 405 U. S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1973).

The Court of Appeals explicitly refers to homosexuality as "this deviate practice". This is indicative of the Court of Appeals' unfortunate prejudging of this case, without proper adherence to the facts of record and/or the proper standard for review. The Court of Appeals presumed a serious danger to the child where no such danger was proven by clear and convincing evidence.

Homosexuals, under both constitutional and humanitarian standards, should and do have the same rights of child custody as heterosexuals. In deciding matters, courts should look to the facts, not to stereotypes and prejudices. Where, as here, the facts show a homosexual who has provided a devoted, loving and totally fit environment, this Court should not separate Shannon from Lu Ann.

To allow social stigma to be a basis for change of custody violates Movant's State and Federal constitutional rights. The Court should not allow the prejudices of those who are cruel enough to tease or embarrass those who are different from themselves to destroy a loving mother-daughter relationship.

If social stigma were the basis to change custody, then children could be taken from any minority such as Blacks, Jews, Catholics, etc. Such results are not permitted be-

cause of the United States and Kentucky Constitutional protections. Sections 1, 3 and 5 of the Kentucky Constitution; First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution; see *Loving* v. *Virginia,* 388 U. S. 1, 87 S. Ct. 1817 (1967); *Stingley* v. *Wesch,* Ill., 222 N. E. 2d 505 (1966); *Goldman* v. *Hicks,* Ala., 1 So. 2d 18 (1941).

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COURT OF APPEALS OF KENTUCKY

No. 79-CA-1588-MR

GARY RAY STEVENSON - - - - - - *Appellant*

v.

LUANN TANDY STEVENSON - - - - - *Appellee*

BRIEF OF APPELLEE

Respectfully submitted,

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Telephone: 584-1254

I hereby certify that a true copy was this 7 day of November, 1979, mailed, postage prepaid, to the Honorable Earl O'Bannon, Jr., Judge, Jefferson Circuit Court, Hall of Justice, 601 West Jefferson Street, Louisville, Kentucky 40202; and to Freeman Blackwell, Esq., 3114 First National Tower, Louisville, Kentucky 40202.

(s) Robert Frederick Smith

The record on appeal of this matter was withdrawn by Appellee's counsel on 1 November 1979 and returned to the Office of Paulie Miller, Jefferson Circuit Court Clerk, on 7 November 1979.

(s) Robert Frederick Smith

II. LESBIANISM, PER SE, IS NOT AN ADEQUATE BASIS TO CHANGE CUSTODY.

Judge O'Bannon correctly states that the only real issue in this case is whether lesbianism per se is adequate to change custody (Tr. 114, 118-119).

He also correctly notes, following his careful survey of the law on this issue, the trend of the courts is to hold that homosexuality "should not per se be a bar to custody." (Tr. 133).

The following authorities are offered in support thereof:

In *Nadler* v. *Superior Court,* 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967), the California Appellate Court overturned the lower court's ruling. The lower court, taking a position which mirrors Appellant's position, had found that lesbian lifestyle by the custodian was *per se* adequate to change custody. While the *Nadler* matter involved an action for mandamus, the *per se* position of the trial court there, and of the appellant here, deserve to be dispensed with in similar matters. The California Trial Court was reversed and Appellant's request should likewise be denied.

The "per se" exclusion of homosexuals from their parents has also been struck in the area of visitation. *In re J.S. and J.C.,* N. J., 324 A. 2d 90 (1974), the Court ruled:

> ". . . the fact that one of the parents is homosexual does not per se provide a sufficient basis for the deprivation of visitation rights."

In *People* v. *Brown,* 49 Mich. App. 358, 212 N. W. 2d 55 (1973), the homosexuality of the woman-custodian was found to have *no* significance and was irrelevant in that it did not render the children's home unfit for them to live in.

In *A.* v. *A.*, Ore., 514 P. 2d 358 (1978), the non-custodian mother, alleging the custodian father was a homosexual, moved for a change of custody. The trial court denied the motion and the Court of Appeals, upholding the trial court, found that the children had not been exposed to any actions of a sexual nature, and found there was no sufficient change in circumstances, and retained the homosexual custodian.

Kastin v. *Kastin,* N. Y. Sup. Ct., Nassau Cty., N. Y., 2 F.L.R. 2698 (1976), is another example of a Court viewing the matter of lesbian custody in light of the facts, not in the unenlightened emotion of stereotypes. Herein the trial court allowed the mother to retain custody of the children despite her "female friend".

In *Schuster* v. *Isaccson,* Wash., 585 P. 2d 130 (1978), the Washington Supreme Court had a similar factual scenario: the non-custodian fathers (consolidation of two (2) cases) requested modifications of custody and contempt against the custodian mothers. The Supreme Court allowed the children to remain with their mothers and the Court removed the lower court's restriction that the women live apart.

In *Armanini* v. *Armanini,* N. Y. Sup. Ct., Nassau Cty., N. Y., 5 F.L.R. 2501 (1979), four (4) minor children remain with their mother despite her lesbian lifestyle.

In *M.P.* v. *S.P.,* N.J. Sup Ct. App. Div., (1979), 5 F.L.R. 2855, the Court awarded custody of the parties' two (2) minor children to their mother. The Court, on both the trial and appellate level, based their decisions on having heard no evidence of an attempt to influence the children's sexual attitudes and found that she was a "dutiful mother."

In *Miller* v. *Miller,* 5 Family Law Reporter 2302 (Michigan Supreme Court, 17 January 1979), the Michigan Supreme Court reversed an order directing that custody of a twelve (12) year old girl be changed from her lesbian mother to her father. The Court stated the "record does

not present clear and convincing evidence that the change of custody is in the best interests of the child."

Also, the Court's attention is directed to 4 Family Law Reporter 2513-2514 (1978). Judge O'Bannon, in his opinion (Tr. 130), found it to be persuasive. Judge Campbell, who has homosexual custody matters before him, urges "that homosexuality alone, having no effect on the child, never be considered a disqualification for custody." He stresses that there is no scientific evidence to show that homosexual homes result in children who are homosexual. (*See also,* Dr. Bloom's deposition, 9 January 1979, pp. 5-10).

It is Appellee's position that the well-reasoned and thoughtful decision cited herein provide this Honorable Court with sufficient precedent for her position that custody of Shannon should continue with her.

The expressions Dr. Riddick invoked by the Appellant are rather whimsical incantations to mislead the Court. It is the burden of proof established by the statutes not preferences which must be followed.

Probably the strongest expressions of this whimsy is the argument that Shannon will be the butt of crude jokes and have a "social stigma" attributable to her.

Even assuming, arguendo, that there may be some "stigma" in having a mother with a different lifestyle, this same sort of "stigma" has been stricken in an analogous matter. In the area of misegination, one of the arguments put forth against inter-racial relationships was that the children would be burdened by a "social stigma". *See, Loving* v. *Virginia,* 388 U. S. 87, ___ S. Ct. 1817 (1967); *Stingley* v. *Wesch,* Ill., 222 N. E. 2d 505 (1966), marriage to a person of the Jewist faith, *Goldman* v. *Hicks,* Ala., 1 So. 2d 18 (1941). Social stigma is not an adequate basis to prevent a relationship or assume physical, mental, moral or emotional danger.

Additionally, while Appellee would be the first to concede that the interests of Shannon have precedence over any constitutional claim, it is necessary to raise same.

A thorough review of the constitutional ramifications will indicate that to deny Luann continued custody of Shannon would be a violation of Petitioner's fundamental rights protected by the First, Ninth and Fourteenth Amendments to the United States Constitution, In Re: *J.S. and J.C., supra.*

As has been stressed above, and as is borne out in the record, Shannon is a normal two (2) (now, almost three (3)) year old child. The experts' testimony did not establish that any of the dangers that are articulated in KRS 403.340 were present.

Because of the lack of such danger, to reach a decision which would take Shannon from Luann would be a travesty of human and constitutional justice.

The parental right of Luann to have Shannon with her is a "fundamental right" which comes within the penumbra of the First Amendment. *See Griswold* v. *Connecticut,* 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

Her freedom of association is also protected by the First Amendment; *NAACP* v. *Alabama,* 357 U. S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 11663 (1962).

The Fourteenth Amendment concept of substantive Due Process protects the Petitioner from unwarranted governmental intrusion; *Meyer* v. *State of Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1045 (1923); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944).

Further, distinctions based upon homosexuality per se are suspect and contrary to the Equal Protection Provision of the Fourteenth Amendment. To ascertain whether depriving Luann custody of Shannon violates Equal Protec-

tion it is necessary to ascertain whether the classification ("homosexuality") is suspect and whether it can survive the "strict scrutiny" standard. This more difficult standard (strict scrutiny) is involved due to the fundamental right (custody) involved; *Shapiro* v. *Thompson,* 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 513 (1969). *Stanley* v. *Illinois,* 405 U. S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1973). Distinctions based upon homosexuality must meet the strict scrutiny test, and it was so applied in *Acanfora* v. *Board of Education,* 359 F. Supp. 843, (D.Md. 1973), aff'd on other grounds, 491 F. 2d 498 (4th Cir. 1974). The leading Supreme Court pronouncement regarding suspect classifications is found in *Frontiero* v. *Richardson,* 411 U. S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973).

In accordance with *Frontiero, supra,* if it is shown that the group can show a "long and unfortunate history of . . . discrimination";[5] that this discrimination is based upon group characteristic which will not likely change; and that characteristic bears no relationship to a member's ability to function in society, then the strict standard must be applied.

To deprive Luann of custody of Shannon, absent a showing as articulated in KRS 403.340, would run *contra* to the strict scrutiny standard and the constitutional rights of homosexuals, as set forth herein. As emphasized, the record indicates that Shannon is in no danger whatsoever.

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[5]Discrimination against homosexuals is well documented. See "Lesbian Mother and Her Right to Child Custody—A Constitutional Challenge That Can No Longer Be Denied," San Diego Law Review (1975), at pp. 799-809, and F.N. 34, p. 824.

JEFFERSON CIRCUIT COURT

FIFTH DIVISION

No. 220098

LUANN TANDY STEVENSON - - - - *Petitioner*

v.

GARY RAY STEVENSON - - - - - *Respondent*

MEMORANDUM IN SUPPORT OF PETITIONER'S POSITION THAT CUSTODY OF SHANNON STEVENSON REMAIN WITH THE PETITIONER

I. INTRODUCTION

This matter was brought before this Court on Respondent's motion to change custody from the Petitioner to himself.

Luann Stevenson, pursuant to an greement entered into on 8 September 1976 and incorporated into a decree of 12 January 1977; has care, custody and control of Shannon, born 24 April 1976. On 11 November 1977 the Respondent made a motion to change custody. The matter was tried in chief on 16 August 1978.

Petitioner has filed accompanying motions to complete this portion of the record.

As may be ascertained from the record, visitation with the Respondent has been recently completed and an additional affidavit is attached herewith. Should the Court desire additional testimony regarding said record of visi-

tation, Petitioner and her counsel have filed an appropriate Motion-Order and would be amenable.

Also as may be ascertained, Petitioner has left her employ with Mother's Brew.

Petitioner's counsel will use reported decisions of the Commonwealth where ever appropriate. However, since there are no relatives, and moving her thousands of miles to Arizona where the Respondent lives would outweigh the "danger" of leaving her with Luann. Thus, in addition to failing to meet the burden established by KRS 403.340, the Respondent has failed to show that the child would be done less harm by more moving her; see *Griffith* v. *Allen*, Ky., 472 S. W. 2d 253 (1971).

In addition this apartment in Arizona, which houses the Respondent, has not been checked by any social agency. It is virtually an unknown entity to this Court. Further consideration to this matter should be given based upon the affidavit filed herein regarding Shannon's visit.

In addition to the statutory claim that Petitioner is making to retain Shannon there are additional constitutional arguments that must be put forth. A thorough review of the constitutional ramifications will indicate that to deny Luann continued custody of Shannon would be a violation of Petitioner's fundamental rights protected by the First, Ninth and Fourteenth Amendments to the United States Constitution, In Re: *JS. and JS.* (supra).

As has been stressed above, and as is borne out in the record, Shannon is a normal two (2) (now, almost three (3)) year old child. The Experts' testimony did not establish that any of the dangers that are articulated in KRS 403.340 were present.

Because of the lack of such danger, to reach a decision which would take Shannon from Luann would be a traversity of human and constitutional justice.

The parental right of Luann to have Shannon with her is a "fundamental right" which comes within penumbra of the First Amendment, see *Griswald* v. *Connecticut,* 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

Her fredom of association is also protected by the First Amendment *NAACP* v. *Alabama* 357 U. S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 11663 (1962).

The Fourteenth Amendment concept of substantive Due Process protects the Petitioner from unwarranted governmental intrusion; *Meyer* v. *State of Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1045 (1923), *Pierce* v. *Society of Sisters,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), *Prince* v. *Commonwealth of Massachusetts* 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944).

Further, distinctions based upon homosexuality are suspect and contrary to the Equal Protection Provision of the Fourteenth Amendment. To ascertain whether depriving Luann custody of Shannon violates Equal Protection it is necessary to ascertain whether the classification ("homosexuality") is suspect and whether it can survive the "strict scrutiny" standard. This more difficult standard (strict scrutiny) is involved due to the fundamental right (custody) involved; *Shapiro* v. *Thompson,* 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 513 (1969); *Stanley* v. *Illinois,* 405 U. S. 645, 92 S. Ct. 1208, L. Ed. 2d 551 (1973). Distinctions based upon homosexuality must meet the strict scrutiny test, and it was so applied in *Acanfora* v. *Board of Education,* 359 F. Supp. 843 (D. Md. 1973), *aff'd.* on other grounds 491 F. 2d 498 (4th Circuit 1974).

The leading Supreme Court pronouncement regarding suspect classification is found in *Frontiero* v. *Richardson,* 411 U. S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973).

In accordance with *Frontiero* (supra) if it is shown that the group can show a "long and unfortunate history

of . . . discrimination";[3] that this discrimination is based upon group characteristic which will not likely change; and that characteristic bears no relationship to a member's ability to function in society, then the strict standard must be applied.

To deprive Luann custody of Shannon, absent a showing as articulated in KRS 403.340, would run contra to the strict scrutiny standard and the constitutional arguments set forth herein. As is pointed out, the record indicates that Shannon is in no danger.

III. CONCLUSION

The evidence does indeed show that Luann has a lesbian lifestyle. But it does *not* show that Shannon is in any manner, endangered rather it shows that Shannon is a normal child who lives with her mother. Even the movant must admit, and did admit at trial Luann Stevenson is a "good mother", (Transcript p. 44) and Shannon is a "happy child" (Transcript pp. 47, 48).

To remove Shannon from Luann on a per se determination because she is a lesbian is unconstitutional and contra to KRS 403.340.

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[3]For a discussion of discrimination against homosexuals see the avowed Lesbian Mother and Her Right To Child Custody; a constitutional challenge that no longer be denied, San Diego Law Review 799 (1975) at pp. 799-809 & FN #34, p. 824.